UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES – GENERAL

Case No. SACV 15-00137-JLS (RNBx) Date: July 29, 2015
Title: Federated University Police Officers' Association et al. v. The Regents of the University of California et al.

Present: **Honorable JOSEPHINE L. STATON, UNITED STATES DISTRICT JUDGE**

Terry Guerrero	N/A
Deputy Clerk	Court Reporter

ATTORNEYS PRESENT FOR PLAINTIFF:	ATTORNEYS PRESENT FOR DEFENDANT:
Not present	Not present

PROCEEDINGS: (IN CHAMBERS) ORDER (1) GRANTING IN PART AND DENYING IN PART JCI'S MOTION TO DISMISS (Doc. 40) AND (2) GRANTING IN PART AND DENYING IN PART THE UC DEFENDANTS' MOTION TO DISMISS (Doc. 41)

Before the Court are two motions to dismiss: one filed by Defendant Johnson Controls, Inc. ("JCI"), and one filed by Defendants The Regents of the University of California ("RUC"), Police Chief Paul Henisey, and Assistant Police Chief Jeffrey Hutchison (collectively, the "UC Defendants"). (JCI Mot., Doc. 40; UC Mot., Doc. 41.) Plaintiffs Federated University Police Officers' Association ("FUPOA") and Andrew Lopez filed oppositions to both motions to dismiss. (JCI Opp'n, Doc. 42; UC Opp'n, Doc. 43.) JCI and the UC Defendants filed separate replies. (JCI Reply, Doc. 44; UC Reply, Doc. 45.) Having reviewed the papers submitted by the parties, held a hearing, and taken the matter under submission, the Court GRANTS in part and DENIES in part JCI's Motion and GRANTS in part and DENIES in part the UC Defendants' Motion.

I. BACKGROUND

The following facts are alleged in Plaintiffs' First Amended Complaint ("FAC").[1] (FAC, Doc. 37.) Plaintiff FUPOA is a non-profit mutual benefit corporation with its

[1] When ruling on a motion to dismiss, the Court accepts as true the factual allegations in the complaint. *Hemi Grp., LLC v. City of New York, N.Y.*, 559 U.S. 1, 5 (2010).

principal place of business in Anaheim, California. (Id. ¶ 3.) FUPOA represents employees who work for RUC as police officers and brings this action on behalf of itself and its members. (Id. ¶¶ 3-4.) Andrew Lopez is an employee of the University of California Police Department who seeks to represent a class defined as:

> All persons employed by the University of California Police Departments whose conversations were audio recorded by the audio/video recording devices installed both within and outside of the University of California Irvine Police Department Building located at 410 East Peltason Drive, Irvine, CA[,] on or after September 1, 2013.

(Id. ¶¶ 5, 45.) RUC is a California corporation that maintains and controls the University of California, Irvine Police Department. (Id. ¶ 6.) Henisey is the Chief of Police for the UC Irvine Police Department, and Hutchison is the Assistant Chief of Police for the UC Irvine Police Department. (Id. ¶¶ 7-8.) Plaintiffs have sued Henisey in both his official and individual capacities, and Hutchison in his individual capacity only. (Id.) JCI is a Wisconsin corporation that installed the recording equipment at issue in this case. (Id. ¶¶ 1, 9.)

In December 2013, Plaintiffs discovered that a "surreptitious network of advanced audio/video recording devices" had been installed at the UC Irvine Police Department Building located at 410 East Peltason Drive, in Irvine, California. (Id. ¶ 16.) JCI allegedly installed and maintained the recording system, enabled and used the audio recording feature, and instructed the UC Defendants on how to use the system. (Id. ¶ 9.) Plaintiffs claim that JCI installed the listening devices to record private communications without Plaintiffs' knowledge or consent and was "a direct participant in the audio recording scheme." (Id.) Plaintiffs also assert that JCI "installed the system in concert with and with the knowledge, participation and approval of each and every Defendant." (Id. ¶ 18.)

The UC Defendants allegedly directed the audio recording "with the complicity, knowledge, direction and approval of all other Defendants." (Id. ¶ 32.) Plaintiffs claim

that the UC Defendants "intentionally intercepted, disclosed, or intentionally used" audio recordings of Plaintiffs' confidential communications and transmitted them by cable or wire. (Id. ¶¶ 16, 23) According to the FAC, Henisey and Hutchison (the "individual UC Defendants") "specifically requested that the listening devices installed at the UC Irvine Police Department have audio recording capabilities" and "specifically requested that [JCI] install the data cable lines from the Dispatch Center to the individual Business Manager's office so that the recordings made by the audio/video recording devices could be viewed and listened to outside of common areas available to general staff." (Id. ¶¶ 32, 35.)

RUC allegedly knew of the individual UC Defendants' actions and "knowingly participated in, directed, and aided such actions through direct and affirmative actions, including, but not limited to funding such actions and reviewing and approving funding for such actions in budgetary oversight." (Id. ¶ 33.) Plaintiffs assert that RUC "approved, ratified and directed [the individual UC Defendants'] actions, including the ordering of, installation, maintenance, integration and training concerning the illegal recording system," and by choosing from among several alternatives as the final decisionmaker. (Id. ¶ 34.)

The FAC further alleges that Defendants recorded multiple conversations "that could not have been heard by other individuals without the hidden recording devices." (Id. ¶ 21.) Plaintiffs claim that they had a reasonable expectation of privacy in these conversations because these "communications were made in non-public areas such as offices, hallways, bathrooms and other locations" and because "Plaintiffs engaged in these conversations when no one was in the immediate area and Plaintiffs did not speak in a loud tone of voice." (Id. ¶¶ 21, 29.) Further, Plaintiffs assert that their reasonable expectations of privacy were violated because surreptitious audio recording of University of California peace officers is not permitted under Penal Code section 830.2. (Id.) Plaintiffs allege that the communications that were recorded by Defendants included "conversations concerning personal financial matters, medical matters, attorney-client privileged communications, union matters and private family matters." (Id. ¶ 30.)

Plaintiffs also allege that Defendants recorded telephone conversations without the parties' consent. (Id. ¶ 31.)

Plaintiffs also claim that "Defendants affirmatively concealed the fact from Plaintiffs . . . that these devices were actively audio recording" their conversations and that the system had "advanced audio recording capabilities capable of penetrating building walls." (Id. ¶ 22.) The audio recording devices allegedly "are highly advanced in their recording capabilities and are able to amplify recordings past those normally perceptible by standard audio recording." (Id. ¶ 100.) In addition, Plaintiffs allege that, even after certain employees discovered the recording system, Defendants "further sought to conceal their wrongful conduct by intentionally deleting several months[']worth of audio recordings." (Id. ¶35.) According to the FAC, the UC Defendants intentionally recorded Plaintiffs' confidential communications and then intentionally destroyed these audio recordings with JCI's assistance and technical expertise. (*See* id. ¶¶ 36-40.) Plaintiffs allege that they currently do not know whether the audio recordings have ceased. (Id. ¶ 22.)

On November 6, 2014, Plaintiffs filed a putative class action Complaint in Alameda County Superior Court against Defendants. (Notice of Removal, Compl., Doc. 1-1.) Defendants removed the case to the Northern District of California on December 18, 2014. (Notice of Removal, Doc. 1; Notice of Joinder, Doc. 2.) On January 28, 2015, pursuant to the parties' stipulation, the Honorable James Donato transferred the case to this Court. (Transfer, Doc. 18; *see also* Order to Reassign Case, Doc. 23.) On April 8, 2015, Plaintiffs filed their FAC. (FAC, Doc. 37.) The FAC asserts the following causes of action:

(1) violation of 18 U.S.C. § 2520 (the "Wiretap Act") – asserted by all Plaintiffs against all Defendants
(2) violation of 42 U.S.C. § 1983 – asserted by all Plaintiffs against all Defendants
(3) violation of California Invasion of Privacy Act ("CIPA") under Cal. Penal Code § 637.2 – asserted by all Plaintiffs against Henisey, Hutchison, and JCI

(4) invasion of privacy/intrusion – asserted by Lopez and the putative class against all Defendants

(5) writ of mandamus pursuant to 28 U.S.C. § 1651 – asserted by all Plaintiffs against RUC

Defendants move to dismiss Plaintiffs' FAC in its entirety. (JCI Mot.; UC Mot.)

II. LEGAL STANDARD

When a motion is made pursuant to Rule 12(b)(1), the plaintiff has the burden of proving that the court has subject matter jurisdiction. *Tosco Corp. v. Cmtys. for a Better Env't*, 236 F.3d 495, 499 (9th Cir. 2001), *overruled on other grounds by Hertz Corp. v. Friend*, 559 U.S. 77 (2010). For the court to exercise subject matter jurisdiction, a plaintiff must show that he or she has standing under Article III. *Cetacean Cmty. v. Bush*, 386 F.3d 1169, 1174 (9th Cir. 2004) ("A suit brought by a plaintiff without Article III standing is not a 'case or controversy,' and an Article III federal court therefore lacks subject matter jurisdiction over the suit." (citation omitted)). Article III sets forth the constitutional limitations on standing, requiring a plaintiff to establish (1) injury in fact, (2) causation, and (3) redressability. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). The injury in fact must be concrete and particularized and actual or imminent, not conjectural or hypothetical. *Id.* at 560. "A jurisdictional challenge under Rule 12(b)(1) may be made either on the face of the pleadings or by presenting extrinsic evidence." *Warren v. Fox Family Worldwide, Inc.*, 328 F.3d 1136, 1139 (9th Cir. 2003). "In a facial attack, the challenger asserts that the allegations contained in a complaint are insufficient on their face to invoke federal jurisdiction." *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004). "Dismissal for lack of subject matter jurisdiction is appropriate if the complaint, considered in its entirety, on its face fails to allege facts sufficient to establish subject matter jurisdiction." *In re Dynamic Random Access Memory (DRAM) Antitrust Litig.*, 546 F.3d 981, 984-85 (9th Cir. 2008).

A motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) tests the legal sufficiency of the claims asserted in the complaint. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678-79 (2009). When evaluating a Rule 12(b)(6) motion, the Court must accept as true all allegations of material facts that are in the complaint and must construe all inferences in the light most favorable to the non-moving party. *See Moyo v. Gomez*, 32 F.3d 1382, 1384 (9th Cir. 1994). Rule 12(b)(6) is read in conjunction with Rule 8(a), which requires only a "short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). Dismissal of a complaint for failure to state a claim is not proper where a plaintiff has alleged "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Twombly*, 550 U.S. at 556). A complaint must (1) "contain sufficient allegations of underlying facts to give fair notice and to enable the opposing party to defend itself effectively," and (2) "plausibly suggest an entitlement to relief, such that it is not unfair to require the opposing party to be subjected to the expense of discovery and continued litigation." *Starr v. Baca*, 652 F.3d 1202, 1216 (9th Cir. 2011). "Although for the purposes of a motion to dismiss [the Court] must take all of the factual allegations in the complaint as true, [it] '[is] not bound to accept as true a legal conclusion couched as a factual allegation.'" *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 555).

III. DISCUSSION

Defendants present several arguments as to why Plaintiffs' FAC should be dismissed in its entirety. Defendants also contend that Plaintiffs have failed to state a claim for each of the five distinct causes of actions alleged in the FAC. The Court first

will address Defendants' arguments that relate to the entirety of Plaintiffs' FAC. The Court then will discuss Defendants' claim-specific arguments.

A. Standing (All Claims)

JCI and the UC Defendants both argue that FUPOA "lacks standing to sue on its own because it has not suffered any injury itself, and lacks standing to sue under associational standing because its members must individually participate in the suit." (JCI Mot. at 15-16; UC Mot. at 20-22.)

In regards to individual standing, JCI contends that FUPOA's vague allegations of harm are insufficient. (UC Mot. at 16.) The UC Defendants similarly argue that FUPOA "fails to allege that it suffered from any harm or injury" because FUPOA "is lumped in with Plaintiff Lopez for all operative allegations regarding alleged violations of privacy." (UC Mot. at 20.) The UC Defendants also argue that FUPOA "does not have standing to bring claims for its members' personal matters" and "does not have an interest that is separate and apart from the individual rights of its members." (UC Reply at 15.)

Plaintiffs, on the other hand, argue that "[i]t is well settled that a union holds privacy rights to union communications – and as such, FUPOA is one of the proper parties to bring a claim for audio recording of such union communications." (JCI Opp'n at 19; UC Opp'n at 20.) Plaintiffs argue that FUPOA has standing to assert a Wiretap Act violation under *Smoot v. United Transp. Union*, 246 F.3d 633 (6th Cir. 2001). (JCI Opp'n at 19-20.) Plaintiffs claim that "[t]his same sound judicial principle applies to [CIPA]" and that FUPOA also has standing to bring a claim under 42 U.S.C. § 1983 (Id. at 20-21.)

Here, Plaintiffs allege that FUPOA "is a non-profit mutual benefit corporation representing employees working for [RUC]." (FAC ¶ 3.) FUPOA brings this action on its own behalf and on behalf of its members. (Id. ¶ 4.) While Defendants contend that FUPOA cannot establish that the organization itself suffered an injury, the FAC explicitly alleges that Defendants recorded communications during meetings between union attorneys and their clients regarding internal affairs investigations, as well as

communications between Plaintiff Lopez and other union members and union attorneys concerning pending union lawsuits. (Id. ¶¶ 30(c)-(d).) Further, Plaintiffs allege that the alleged unlawful recording of these confidential communications injured FUPOA because it interfered with "FUPOA's ability to represent on matters within the scope of bargaining" and its "privacy rights to union communications." (Id. ¶ 30(d).) As a result, despite Defendants' arguments to the contrary, FUPOA has alleged a concrete, particularized, and actual injury in fact to establish Article III standing.

As a corporation and association serving as the bargaining unit for employees working for RUC, FUPOA has standing as a person whose communications were intercepted in violation of the Wiretap Act. *See Smoot v. United Transp. Union*, 246 F.3d 633, 640-41 (6th Cir. 2001) (finding standing satisfied as to two representative organizations because they had possessory interests in the communications). Further, because FUPOA's § 1983 is in part based on its Wiretap Act claim, FUPOA also has standing to assert a claim under § 1983. Finally, "[a]lthough a corporation may not pursue a common law action for invasion of privacy, it may bring an action for violation of the Privacy Act." *Coulter v. Bank of America*, 28 Cal. App. 4th 923, 930 (1994); *see also* Cal. Penal Code §§ 637.2, 632(b) (providing that any person injured by a violation of CIPA may bring a civil action against the person who committed the violation and defining the term "person" as including "an individual, business association, partnership, corporation, limited liability company, or other legal entity").

As a result, the Court finds that FUPOA has standing to assert its Wiretap Act, CIPA, and § 1983 claims against Defendants. Because FUPOA has satisfied the requirements for individual standing in regards to those claims, and because Plaintiffs' invasion of privacy/intrusion claim is asserted by Lopez and the putative class only, the Court need not address whether FUPOA has satisfied the requirements of associational standing.[2]

[2] Nevertheless, even if the Court were to analyze the requirements for associational standing, FUPOA would satisfy these requirements. An organization may bring suit on behalf of its members on the basis of associational standing if the entity can show: "(1) at least one of its members would have standing to sue in his own right, (2) the interests the suit seeks to vindicate are germane to the organization's purpose, and (3) neither the claim asserted nor the relief

Accordingly, the Court DENIES both JCI's and the UC Defendants motions to dismiss to the extent they seek to dismiss FUPOA for lack of standing.

B. Class Allegations (All Claims)

JCI next contends that Plaintiffs have failed to plead facts that support a class action because Plaintiffs have failed to plead an ascertainable class, establish similarity or commonality of injury, or show predominance of common issues. (*See* JCI Mot. at 17-19.) Plaintiffs, however, argue that "[g]iven the early stage of proceedings it is premature to rule on the propriety of Plaintiffs' class allegations." (JCI Opp'n at 22.)

The present case is currently at the pleading stage and thus "[w]hether or not certification on a [class] basis is appropriate in this case is not an issue that is currently before this Court." *Allen v. Hylands, Inc.*, No. CV 12-01150 DMG MANX, 2012 WL 1656750, at *2 (C.D. Cal. May 2, 2012); *see also In re Wal-Mart Stores, Inc. Wage & Hour Litig.*, 505 F. Supp. 2d 609, 615 (N.D. Cal. 2007) ("In the absence of any discovery or specific arguments related to class certification, the Court is not prepared to rule on the propriety of the class allegations and explicitly reserves such a ruling.")

Accordingly, the Court DENIES JCI's Motion to the extent JCI seeks to strike Plaintiffs' class allegations.

requested requires the participation of individual members in the lawsuit." *Fleck & Assocs., Inc. v. City of Phoenix*, 471 F.3d 1100, 1105-06 (9th Cir. 2006). Here, Plaintiff Lopez is a member of FUPOA and his standing to sue has not been challenged by Defendants. Further, FUPOA seeks to vindicate its interests in confidential union communications and attorney-client communications with its members, and these interests are germane to FUPOA's purpose. Finally, while FUPOA seeks damages, which may require the participation of individual members in the lawsuit, FUPOA also seeks injunctive relief, which does not require the participation of individual members.

C. Special Damages (All Claims)

JCI also argues that "Plaintiffs' allegations purporting to seek 'special damages' against JCI must be stricken because such pleading is improper under" Federal Rule of Civil Procedure 9(g). (JCI Mot. at 19-20.) According to JCI, "the FAC provides no information . . . on special damages apart from generally seeking them." (JCI Reply at 19.) However, Plaintiffs contend that, "because Plaintiffs sufficiently put JCI on notice with regards to the damages claimed," the object of Rule 9(g) has been satisfied. (JCI Opp'n at 24.)

Under Federal Rule of Civil Procedure 9(g), "[i]f an item of special damage is claimed, it must be specifically stated. Fed. R. Civ. P. 9(g). Here, Plaintiffs assert only that "[a]s a result of Defendants' wrongful conduct . . . , Plaintiffs have incurred general and special damages in an amount not yet fully ascertained, but in excess of the jurisdictional minimum of this Court. (FAC ¶¶ 78, 92, 111, 124.) This allegation is insufficient under Rule 9(g) because it fails to provide any detail with regards to the special damages claimed. *See Harris v. City of Seattle*, No. C02-2225P, 2003 WL 1045718, at *8 (W.D. Wash. Mar. 3, 2003) ("While many facts were included in the complaint, it is impossible to determine what the special damages alleged would consist of . . . .").

Accordingly, Plaintiffs' claim of special damages is STRICKEN, but with LEAVE TO AMEND.

D. Injunctive Relief (All Claims)

JCI next argues that Plaintiffs have failed (1) to seek injunctive relief against JCI in the claims for relief against JCI or (2) allege ongoing or imminent harm. (JCI Mot. at 20.) Accordingly, JCI requests that the Court strike Plaintiffs' prayer for injunctive relief against JCI. (Id.)

Plaintiffs, however, specifically allege that they "are entitled to an order enjoining *Defendants* from illegally recording Plaintiffs." (FAC ¶ 90 (emphasis added).) While

Plaintiffs also allege that injunctive relief is required to restrain and enjoin RUC specifically from injuring Plaintiffs, paragraph 90 of the FAC nevertheless seeks to enjoin all of the Defendants, which includes JCI. (Id.) Further, Plaintiffs have alleged ongoing or imminent harm by suggesting that the audio recordings may not have ceased. (*See* id. ¶ 22.) Therefore, the Court will not strike Plaintiffs' prayer for injunctive relief against JCI.

Accordingly, the Court DENIES JCI's Motion to the extent JCI has moved to strike Plaintiffs' prayer for injunctive relief against JCI.

E. The Wiretap Act - 18 U.S.C. § 2520 (Claim 1)

JCI and the UC Defendants both move to dismiss Plaintiffs' 18 U.S.C. § 2520 claim.

18 U.S.C. § 2520 provides a civil cause of action for "any person whose wire, oral, or electronic communication is intercepted, disclosed, or intentionally used in violation of this chapter." 18 U.S.C. § 2520(a). Under 18 U.S.C. § 2511(1)(a), it is unlawful to "intentionally intercept[], endeavor[] to intercept, or procure[] any other person to intercept or endeavor to intercept, any wire, oral or electronic communication." 18 U.S.C. § 2511(1)(a). Further, it is unlawful for a person to "intentionally manufacture[], assemble[], possess[], or sell[] any electronic, mechanical, or other device, knowing or having reason to know that the design of such device renders it primarily useful for the purpose of the surreptitious interception of wire, oral, or electronic communications." 18 U.S.C. § 2512(1)(b). However, the Wiretap Act states that it is not unlawful for "a provider of wire or electronic communication service or an officer, agent, or employee of, or a person under contract with, such a provider, in the normal course of the business of providing that wire or electronic communication service . . . to send through the mail, send or carry in interstate or foreign commerce, or manufacture, assemble, possess, or sell any electronic, mechanical, or other device knowing or having reason to know that the design of such device renders it primarily useful for the purpose of the surreptitious interception of wire, oral, or electronic communications. 18 U.S.C. § 2512(2).

1. JCI

As an initial matter, JCI argues that 18 U.S.C. § 2520 does not provide a cause of action against aiders and abettors. (JCI Mot. at 6.) In their opposition to JCI's Motion, Plaintiffs did not oppose JCI's argument that it cannot be held liable on an aiding and abetting theory. (*See also* JCI Reply at 1 n.1.) Nonetheless, "§ 2520(a) does not provide a cause of action against aiders and abettors." *In re Toys R Us, Inc., Privacy Litig.*, No. 00-CV-2746, 2001 WL 34517252, at *7 (N.D. Cal. Oct. 9, 2001). Accordingly, Plaintiffs may not proceed against JCI on an aiding and abetting theory. The Court therefore must determine whether Plaintiffs have sufficiently pleaded a Wiretap Act claim against JCI on a basis other than an aiding and abetting theory of liability.

JCI claims that the Wiretap Act "expressly states that installation does not make the installer liable." (JCI Mot. at 5 (citing 18 U.S.C. § 2512(2).) JCI contends that JCI simply installed the recording system because the government hired it to do so, and thus it cannot be held liable under the Wiretap Act. (Id.) Alternatively, JCI argues that a violation of the Wiretap Act requires that JCI's alleged activity be done "intentionally," but that Plaintiffs have failed to plead any facts to support this element of the claim and make only naked assertions and legal conclusions that fail under *Twombly/Iqbal*. (JCI Mot. at 6-7.) According to JCI, "it cannot be inferred merely from the lawful act of installing the system that JCI had an improper purpose in doing so." (JCI Mot. at 5.)

Plaintiffs, on the other hand, argue that the FAC alleges that JCI was a "direct and intentional participant" in the alleged recordings of Plaintiffs confidential communications and that JCI's conduct "went far beyond that of a mere installer." (JCI Opp'n at 5.) For example, Plaintiffs argue that they have sufficiently pleaded a Wiretap Act violation against JCI because they allege that JCI concealed the recordings from Plaintiffs, had an illegal purpose, and deleted the audio recordings in concert with the other Defendants. (Id.)

Plaintiffs have alleged that JCI installed a "surreptitious network of advanced audio/video recording devices" at the UC Irvine Police Department Building. (FAC

¶ 16.) The FAC asserts that JCI installed and maintained the recording system, enabled and used the audio recording feature, and instructed the UC Defendants on how to use the system. (Id. ¶ 9.) Further, Plaintiffs claim that JCI installed the listening devices to record private communications without Plaintiffs' knowledge or consent and was "a direct participant in the audio recording scheme." (Id. ¶ 18.) However, contrary to Plaintiffs' contentions, the FAC cannot be read as asserting that JCI "went far beyond that of a mere installer." (JCI Opp'n at 5.) Other than the conclusory allegation that JCI was a "direct and intentional participant" in the alleged recording scheme and conclusory remarks concerning JCI's role in installing the audio recording devices at the UC Irvine Police Department, nothing in the FAC suggests that JCI acted intentionally or as anything other than a mere installer.[3] As a result, not only have Plaintiffs failed to satisfy the intentionality requirement of 18 U.S.C. § 2511(1)(a), but Plaintiffs' allegations also fail to show that JCI is not entitled to the exception found in 18 U.S.C. § 1512(2).

Accordingly, the Court GRANTS JCI's Motion to the extent JCI has moved to dismiss Plaintiffs' first claim. Plaintiffs' Wiretap Act claim against JCI therefore is DISMISSED WITHOUT PREJUDICE.

2. UC Defendants

a) RUC and Henisey in His Official Capacity

The UC Defendants argue that this claim should be dismissed as to RUC and Henisey in his official capacity because RUC is a state entity and not a "person" within the meaning of the Wiretap Act. (UC Mot. at 5.) The UC Defendants claim that, under the plain text of 18 U.S.C. § 2511(a), the Wiretap Act does not extend to governmental units such as RUC. (Id. at 6.) Additionally, they argue that 18 U.S.C. § 2520(a) does not

[3] The allegations concerning JCI's role in the subsequent destruction of audio recordings is not only cursory and conclusory, but also does not relate to any alleged "interception" of communications that the Wiretap Act makes unlawful.

demonstrate a "clear and unequivocal" intent to extend liability to government entities such as RUC because "[a]lthough the term 'entity' was added to Section 2520, the definition of 'person' contained in section 2510(b) specifically applies to the entire chapter, and remains unchanged, even after the modification of section 2520." (UC Reply at 2-3.) According to the UC Defendants, "[a]s a constitutionally created branch of state government [under article IX, section 9 of the California Constitution], RUC is nothing other than a governmental entity." (UC Reply at 1-2.) Finally, the UC Defendants argue that a claim against an employee of RUC in his or her official capacity is also considered a suit against RUC. (UC Reply at 4.) Plaintiffs, however, claim that, "[b]ased on its status as a corporation, RUC is actually a 'person' within the meaning of the statute, and thus may be held civilly liable. (UC Opp'n at 6.)

18 U.S.C. § 2520 provides a civil cause of action for "any person whose wire, oral, or electronic communication is intercepted, disclosed, or intentionally used in violation of this chapter." 18 U.S.C. § 2520(a). The aggrieved party may sue "the *person or entity*, other than the United States, which engaged in that violation." Id. (emphasis added). "Person" is defined as "any employee, or agent of the United States or any State or political subdivision thereof, and any individual, partnership, association, joint stock company, trust, or corporation." 18 U.S.C. § 2510(6).

The statute originally provided for recovery against only "the person" who violated the Wiretap Act. *See Seitz v. City of Elgin*, 719 F.3d 654, 656 (7th Cir.) *cert. denied sub nom. Seitz v. City of Elgin, Ill.*, 134 S. Ct. 692, 187 L. Ed. 2d 551 (2013) (providing a detailed discussion and analysis of the scope of the Wiretap Act and whether municipalities can be held liable under its provisions). Thus, under the original statute's language and the definition of "person," governmental units themselves clearly would be excluded from the definition of "person." *Seitz*, 719 F.3d at 656. In 1986, however, Congress extended the cause of action to any "person or entity" committing a violation. *Id.*; 18 U.S.C. § 2520(a). Further, in 2001, the PATRIOT Act added the phrase "other than the United States." *Id.* Plaintiffs contend that the 1986 and 2001 amendments to 18 U.S.C. § 2520 brought municipalities within the scope of the Wiretap Act by expressing

Congress' intent to extend liability to governmental units such as RUC. (UC Opp'n at 6-8.)

Some courts have found municipalities amenable to suit under 18 U.S.C. § 2520 for the Wiretap Act. *See Seitz*, 719 F.3d at 657 (citing cases). Plaintiffs rely heavily on *Adams v. City of Battle Creek*, 250 F.3d 980 (6th Cir. 2001), which held that municipalities are generally amenable to suit under 18 U.S.C. § 2520. *Id.* at 985-86. However, in 2013, the Seventh Circuit engaged in a more detailed analysis of the various provisions of the Wiretap Act and found that, even though "entity" as used in § 2520 includes government units, § 2520 does not provide a cause of action against municipalities because § 2520 itself creates no substantive rights. *Seitz*, 719 F.3d at 657. As the *Seitz* court explained, § 2520 "simply provides a cause of action to vindicate rights identified in other portions of the [Wiretap Act], specifically communications 'intercepted, disclosed, or intentionally used *in violation of this chapter*.'" *Id.* (citing 18 U.S.C. § 2520(a)) (emphasis in original). *Seitz* therefore held that "§ 2511(1) protects only against actions taken by a "person" as defined in the statute, which does not include municipalities." *Id.* at 658. Thus, the Seventh Circuit concluded that, "even though 'entity' includes government units, § 2520 provides no cause of action against a municipality for violations of § 2511(1) because nothing in the 1986 amendments altered the scope of the substantive violation by expanding it beyond 'persons' as defined in the [Wiretap Act]." *Id.*

The Court finds the Seventh Circuit's reasoning in *Seitz* convincing. Accordingly, this Court adopts *Seitz*'s holding that § 2520 provides no cause of action against a municipality for violations of § 2511(1). Here, RUC is "a constitutionally created arm of the state." *Regents of Univ. of California v. City of Santa Monica*, 77 Cal. App. 3d 130, 135, 143 (1978). Further, Cal. Gov. Code § 811.2 defines "public entity" as including "the state [and] the Regents of the University of California." Cal. Gov't Code § 811.2. Thus, RUC is immune from suit under the Wiretap Act. And to the extent that Plaintiffs have sued Henisey in his official capacity, Henisey cannot be held liable under the Wiretap Act because he is an employee of RUC. *See Hafer v. Melo*, 502 U.S. 21, 27 (1991) ("State officers sued for damages in their official capacity are not 'persons' for

purposes of the suit because they assume the identity of the government that employs them.").

Accordingly, the Court GRANTS the UC Defendants' Motion to the extent that UC Defendants' have moved to dismiss Plaintiffs' first claim against RUC and Henisey in his official capacity. Plaintiffs' claim for violations of the Wiretap Act as asserted against RUC and Henisey in his official capacity therefore is DISMISSED WITH PREJUDICE.

b) Henisey and Hutchison in Their Individual Capacities

In regards to Plaintiffs' Wiretap Act claim against Henisey and Hutchison in their individual capacities, the UC Defendants argue that "Plaintiffs fail to plead sufficient facts to support the Wiretap Act's requirement of intentional conduct," and that the FAC's conclusory statements and legal allegations are insufficient. (UC Mot. at 9-10.) The UC Defendants claim that Plaintiffs have failed to allege "that the UC Defendants purchased and installed the new video recording system with the conscious purpose and intent of intercepting Plaintiffs' confidential oral communications" or that the "audio recording was intentional, as opposed to inadvertent." (Id. at 10.) Further, according to the UC Defendants, "Plaintiffs' general allegations regarding the UC Defendants' knowledge of the precise nature of the alleged advanced recording attributes fail to establish intent." (UC Reply at 5.) Finally, the UC Defendants argue that "allegations that the UC Defendants deleted recordings do not establish that the UC Defendants acted intentionally." (Id. at 6.)

Plaintiffs, however, allege that the individual UC Defendants "specifically requested that the listening devices installed at the UC Irvine Police Department have audio recording capabilities" and "specifically requested that [JCI] install the data cable lines from the Dispatch Center to the individual Business Manager's office so that the recordings made by the audio/video recording devices could be viewed and listened to outside of common areas available to general staff." (FAC ¶¶ 32, 35.) Further, Plaintiffs assert that all of the UC Defendants "intentionally intercepted, disclosed, or intentionally

used" audio recordings of Plaintiffs' confidential communications and transmitted them by cable or wire. (Id. ¶¶ 16, 23). Taking these allegations as true, as the Court must do at the motion to dismiss stage, Plaintiffs have provided sufficient factual allegations to support the inference that the recordings were not inadvertent. Therefore, the Court finds that Plaintiffs have alleged adequately that the individual UC Defendants acted intentionally.

Accordingly, to the extent the UC Defendants have moved to dismiss Plaintiffs' Wiretap Act claim as asserted against Henisey and Hutchison in their individual capacities, the UC Defendants' Motion is DENIED.

F. California Invasion of Privacy Act ("CIPA") - Cal. Penal Code § 637.2 (Claim 3)

JCI and the UC Defendants next move to dismiss Plaintiffs' CIPA claim.

CIPA imposes liability on "[e]very person who, intentionally and without the consent of all parties to a confidential communication, by means of any electronic amplifying or recording device, eavesdrops upon or records the confidential communication." Cal. Penal Code § 632(a). "[T]he recording of a confidential conversation is intentional if the person using the recording equipment does so with the purpose or desire of recording a confidential conversation, or with the knowledge to a substantial certainty that his use of the equipment will result in the recordation of a confidential conversation." *Marich v. MGM/UA Telecomms., Inc.*, 113 Cal. App. 4th 415, 421 (2003) (internal quotation marks and citation omitted). Further, Cal. Penal Code. § 635(a) imposes liability on "[e]very person who manufactures, assembles, sells, offers for sale, advertises for sale, possesses, transports, imports, or furnishes to another any device which is primarily or exclusively designed or intended for eavesdropping upon the communication of another." Cal. Penal Code § 635(a). However, liability under Cal. Penal Code § 635 cannot be imposed on "[a] person engaged in selling devices . . . for use by, or resale to, . . . state, county, or municipal law enforcement agencies. Cal. Penal Code § 635(b)(1)(C).

1. JCI

JCI argues that Plaintiffs' third claim fails because CIPA expressly excludes vendor liability. (JCI Mot. at 9.) Alternatively, JCI contends that "Plaintiffs fail to allege a factual basis as to how JCI acted intentionally," which is required under the statute. (JCI Mot. at 10.) According to JCI, the fact that "JCI lawfully installed the system does not provide a basis to infer that JCI did so intending to eavesdrop unlawfully." (Id.) Plaintiffs argue, however, that they "specifically allege JCI did much more than merely sell and install the recording system." (JCI Opp'n at 10.)

As discussed above in regards to Plaintiffs' Wiretap Act claim, Plaintiffs have alleged that JCI installed a "surreptitious network of advanced audio/video recording devices" at the UC Irvine Police Department Building. (FAC ¶ 16.) The FAC asserts that JCI installed and maintained the recording system, enabled and used the audio recording feature, and instructed the UC Defendants on how to use the system. (Id. ¶ 9.) Further, Plaintiffs claim that JCI installed the listening devices to record private communications without Plaintiffs' knowledge or consent and was "a direct participant in the audio recording scheme." (Id. ¶ 18.) However, the FAC cannot be read as asserting that JCI "did much more than merely sell and install the recording system." (JCI Opp'n at 10.) Other than the conclusory allegation that JCI was a "direct and intentional participant" in the alleged recording scheme and conclusory remarks concerning JCI's role in installing the audio recording devices at the UC Irvine Police Department, nothing in the FAC suggests that JCI acted as anything other than a seller and installer to a law enforcement agency or acted intentionally in eavesdropping on/recording Plaintiffs' confidential communications.[4] As a result, Plaintiffs have failed to assert a claim under

[4] Once again, the allegations concerning JCI's role in the subsequent destruction of audio recordings is not only cursory and conclusory, but also does not relate to any alleged "eavesdropping" or "recording" of confidential communications that CIPA makes unlawful.

§ 632 or allege adequately that JCI is not entitled to the exception found in § 635(b)(1)(C).

Accordingly, the Court GRANTS JCI's Motion to the extent JCI has moved to dismiss Plaintiffs' third claim. Plaintiffs' CIPA claim against JCI therefore is DISMISSED WITHOUT PREJUDICE.[5]

2. The Individual UC Defendants

a) Intentional Conduct

According to the individual UC Defendants, Plaintiffs have failed to plead adequately the requisite intentional conduct to state a claim under CIPA. (UC Mot. at 11-12.) The individual UC Defendants also argue that CIPA "does not address the deletion of recording [sic] of confidential communications. As such, Plaintiffs' allegations that the UC Defendants deleted recordings do not establish the essential element of intentional conduct." (UC Reply at 8.) Plaintiffs, however, contend that their "specific allegations demonstrate the individual UC Defendants not only acted intentionally but also sought to conceal their wrongful conduct, thereby further demonstrating their consciousness of wrongdoing." (UC Opp'n at 10.)

As discussed above in regards to Plaintiffs' Wiretap Act claim, Plaintiffs allege that the individual UC Defendants "specifically requested that the listening devices installed at the UC Irvine Police Department have audio recording capabilities" and "specifically requested that [JCI] install the data cable lines from the Dispatch Center to the individual Business Manager's office so that the recordings made by the audio/video recording devices could be viewed and listened to outside of common areas available to

[5] Because the Court has dismissed Plaintiffs' CIPA claim against JCI on alternative grounds, the Court need not address here the parties' arguments regarding whether CIPA provides for aiding and abetting liability, (JCI Mot. at 10; JCI Opp'n at 11; JCI Reply at 10-11), or whether Plaintiffs had a reasonable expectation of privacy in the allegedly confidential communications. (JCI Mot. at 11; JCI Opp'n at 15; JCI Reply at 13.)

general staff." (Id. ¶¶ 32, 35.) Further, Plaintiffs assert that all of the UC Defendants "intentionally intercepted, disclosed, or intentionally used" audio recordings of Plaintiffs' confidential communications and transmitted them by cable or wire. (Id. ¶¶ 16, 23). Finally, Plaintiffs allege that "this illegal scheme was done at the direction of" the individual UC Defendants." (Id. ¶ 106.) As a result, taking these allegations as true, Plaintiffs have alleged sufficiently that the individual UC Defendants acted intentionally.

The Court therefore finds that Plaintiffs have pled adequately the requisite intentionality under § 632(a).

b) Confidential Communication

The individual UC Defendants, however, further argue that Plaintiffs' "CIPA claim is defective for the additional reason that Plaintiffs have failed to plead facts sufficient to establish the recording of a 'confidential communication.'" (UC Mot. at 12.) According to the individual UC Defendants, "Plaintiffs plead no facts showing that based on the operational realities of their workplace at the police department they had a reasonable expectation of privacy in their conversations." (Id. at 12-13.) The individual UC Defendants claim that "the mere fact that the locations are not open [to] the public do not render them automatically private," because "[i]t is the circumstances surrounding the conversation and not the substance of the conversation that determines whether Plaintiffs' expectation of privacy is objectively reasonable." (UC Reply at 9-10 (italics omitted).) Plaintiffs, on the other hand, argue that "this Court cannot hold as a matter of law that no inferences of an objectively reasonable expectation of privacy can be drawn from the FAC." (UC Opp'n at 12.)

Under CIPA, "[e]very person who, intentionally and without the consent of all parties to a confidential communication, by means of any electronic amplifying or recording device . . . records the confidential communication" violates CIPA. Cal. Penal Code § 632(a). "The term 'confidential communication' includes any communication carried on in circumstances as may reasonably indicate that any party to the communication desires it to be confined to the parties thereto, but excludes a

communication made in a public gathering . . . or in any other circumstance in which the parties to the communication may reasonably expect that the communication may be overheard or recorded." Cal. Penal Code § 632(c). "The California Supreme Court has concluded that a conversation is confidential within the meaning of Section 632 'if a party to that conversation has an objectively reasonable expectation that the conversation is not being overheard or recorded.'" *Faulkner v. ADT Sec. Servs., Inc.*, 706 F.3d 1017, 1019 (9th Cir. 2013) (citing *Kearney v. Salomon Smith Barney, Inc.* 39 Cal. 4th 95, 117 n.7 (2006)). "The standard of confidentiality is an objective one defined in terms of reasonableness. *Id.* (internal quotation marks and citation omitted).

"An established regulatory scheme or specific office practice may, under some circumstances, diminish an employee's reasonable expectation of privacy." *United States v. McIntyre*, 582 F.2d 1221, 1224 (9th Cir. 1978). However, "[a] police officer is not, by virtue of his profession, deprived of the protection[s] of the Constitution" or privacy statutes. *Id.* "To prevail against the Rule 12(b)(6) motion, then, [Plaintiffs] have to allege facts that would lead to the plausible inference that [there] was a confidential communication—that is, a communication that he had an objectively reasonable expectation was not being recorded." *Faulkner*, 706 F.3d at 1020. "Whether a reasonable expectation of privacy is violated by such recording depends on the exact nature of the conduct and all the surrounding circumstances." *Sanders v. Am. Broad. Cos., Inc.*, 20 Cal. 4th 907, 911 (1999).

Here, Plaintiffs have pled facts that plausibly show that Plaintiffs had a reasonable expectation of privacy in their conversations at the UC Irvine Police Department. Plaintiffs have specifically alleged that Defendants recorded multiple conversations "that could not have been heard by other individuals without the hidden recording devices." (FAC ¶ 21.) Plaintiffs claim that "Defendants affirmatively concealed the fact from Plaintiffs . . . that these devices were actively audio recording" their conversations and that the system had "advanced audio recording capabilities capable of penetrating building walls." (Id. ¶ 22.) The audio recording devices allegedly "are highly advanced in their recording capabilities and are able to amplify recordings past those normally perceptible by standard audio recording." (Id. ¶ 100.) Plaintiffs also claim that they had

a reasonable expectation of privacy in these conversations because these "communications were made in non-public areas such as offices, hallways, bathrooms and other locations" and because "Plaintiffs engaged in these conversations when no one was in the immediate area and Plaintiffs did not speak in a loud tone of voice." (Id. ¶ 29.) Further, Plaintiffs allege that the recording devices were strategically placed throughout the UC Irvine Police Department to record the communications in rooms where Plaintiffs reasonably believed conversations could not be overheard. (*See* id. ¶¶ 24, 25, 28, 29.) Finally, Plaintiffs allege that Defendants recorded a variety of communications, including private conversations concerning financing of mortgages, loans, and class members' private financial condition; specific medical treatments and medical history; meetings between union attorneys and their clients regarding their internal affairs investigations; union working conditions, concerted activities, and grievances involving their memorandum of understanding and other bargaining matters; marriages and child care. (Id. ¶ 30.) Despite the UC Defendants' arguments to the contrary, if the Court accepts as true all allegations of material facts in the FAC and construes all inferences in the light most favorable to Plaintiffs, Plaintiffs have pled facts sufficient to establish the recording of a confidential communication and that they had a reasonable expectation of privacy in these confidential communications.

Accordingly, to the extent that the UC Defendants' have moved to dismiss Plaintiffs' CIPA claim as asserted against Henisey and Hutchison in their individual capacities, the motion is DENIED.

G. Invasion of Privacy – Intrusion (Claim 4)

JCI and the UC Defendants next move to dismiss Plaintiffs' common law intrusion claim.

"A privacy violation based on the common law tort of intrusion has two elements. First, the defendant must *intentionally* intrude into a place, conversation, or matter as to which the plaintiff has a reasonable expectation of privacy. Second, the intrusion must occur in a manner highly offensive to a reasonable person. *Hernandez v. Hillsides, Inc.*,

47 Cal. 4th 272, 286 (2009) (emphasis added). "The elements of both the statutory invasion of privacy and common law invasion of privacy include *intentional* conduct." *Marich*, 113 Cal. App. 4th at 421. "[T]he recording of a confidential conversation is intentional if the person using the recording equipment does so with the purpose or desire of recording a confidential conversation, or with the knowledge to a substantial certainty that his use of the equipment will result in the recordation of a confidential conversation." *Id.* (internal quotation marks and citation omitted).

1. JCI

JCI argues that Plaintiffs' fourth cause of action for intrusion fails because the tort of intrusion requires an intentional intrusion into an individual's privacy, yet Plaintiffs have failed to plead facts sufficient to show that JCI acted with the requisite intent. (JCI Mot. at 12.) JCI contends that "Plaintiffs have identified no possible motive for a vendor such as JCI to have such a nefarious intent as to individuals in the police station." (Id. at 13.)

Once again, Plaintiffs have failed to allege the requisite intentional conduct. Other than the conclusory allegation that JCI was a "direct and intentional participant" in the alleged recording scheme, and conclusory remarks concerning JCI's role in installing the audio recording devices at the UC Irvine Police Department, nothing in the FAC suggests that JCI acted intentionally. Therefore, Plaintiffs have failed to allege adequately that JCI used the recording equipment with the purpose or desire of recording Plaintiffs' confidential conversations, or with the knowledge to a substantial certainty that the use of the equipment would result in the recordation of confidential conversations.

Accordingly, the Court GRANTS JCI's Motion to the extent JCI has moved to dismiss Plaintiffs' fourth claim. Plaintiffs' intrusion claim against JCI therefore is DISMISSED WITHOUT PREJUDICE.

2. UC Defendants

a) Damages

First, the UC Defendants contend that, though the California Constitution provides a cause of action for invasion of privacy, Plaintiffs' request for damages based on this claim should be dismissed because the California Constitution does not afford a right to damages. (UC Reply at 10.) The UC Defendants also argue that punitive damages are not an available remedy against a public entity such as RUC under Cal. Gov't Code § 818. (Id.)

The California Constitution provides a cause of action for invasion of privacy against both private and government entities. *Hill v. Nat'l Collegiate Athletic Ass'n*, 7 Cal. 4th 1, 20 (1994). However, "[a]lthough citizens have a private cause of action against public entities for violation of the right to privacy, no case has ever held that California Constitution, article I, section 1, imposes a mandatory duty on public entities to protect a citizen's right to privacy. The constitutional mandate is simply that the government is prohibited from violating the right; if it does, an aggrieved citizen may seek an injunctive remedy in court." *Clausing v. San Francisco Unified School District*, 221 Cal. App. 3d 1224, 1238 (1990); *see also Katzberg v. Regents of Univ. of California*, 29 Cal. 4th 300, 314-15 (2002) (explaining that in *Clausing* the court "concluded that the privacy provision affords only a right to injunctive relief and does not afford a right to damages"). Further, "a public entity is not liable for . . . damages imposed primarily for the sake of example and by way of punishing the defendant." Cal. Gov. Code § 818. As a result, Plaintiffs may seek injunctive relief only under Plaintiffs' fourth cause of action because the privacy provision of the California Constitution does not afford a right to damages. In addition, Plaintiffs are not permitted to seek punitive damages against RUC under Cal. Gov. Code § 818. (*See* FAC ¶¶ 93, 126; id. at 35 ¶ I),

Accordingly, the Court STRIKES Plaintiffs' request for damages to the extent that it is based on Plaintiffs' invasion of privacy claim and STRIKES any request for punitive damages against RUC found in the FAC.

b) Substantive Liability

"A privacy violation based on the common law tort of intrusion has [multiple] elements. First, the defendant must intentionally intrude into a place, conversation, or matter as to which the plaintiff has a reasonable expectation of privacy. [Additionally], the intrusion must occur in a manner highly offensive to a reasonable person." *Hernandez*, 47 Cal. 4th at 286. "[T]he plaintiff must show the defendant penetrated some zone of physical or sensory privacy surrounding, or obtained unwanted access to data about, the plaintiff. The tort is proven only if the plaintiff had an objectively reasonable expectation of seclusion or solitude in the place, conversation or data source." *Sanders*, 20 Cal. 4th at 914-15 (internal quotation marks and citation omitted). The UC Defendants argue that Plaintiffs' intrusion claim should be dismissed because Plaintiffs fail to plead facts that demonstrate (1) that the UC Defendants intentionally intruded into their privacy, (2) that Plaintiffs had a reasonable expectation of privacy in conversations occurring in and around the UC Irvine Police Department, or (3) that the UC Defendants intruded into Plaintiffs' privacy or used the alleged recordings in a manner highly offensive to a reasonable person. (UC Mot. at 16-19.) The Court will address each of the UC Defendants' substantive liability arguments in turn.

i. Intentional Conduct

The UC Defendants first contend that "Plaintiffs fail to plead facts plausibly showing that the UC Defendants acted with the requisite intent to intrude into Plaintiffs' privacy." (UC Mot. at 17.) This argument fails, however, for the same reasons the Court has found that Plaintiffs have pleaded adequately intentional conduct in regards to their Wiretap Act and CIPA claims. *See Hernandez*, 47 Cal. 4th at 287 ("The right to privacy in the California Constitution sets standards similar to the common law tort of intrusion.").

Accordingly, the Court will not dismiss Plaintiffs' common law privacy claim on this basis.

ii. Reasonable Expectation of Privacy

The UC Defendants next contend that "Plaintiffs fail to plead facts plausibly showing that Plaintiffs had a reasonable expectation of privacy in conversations occurring in and around the UCI P[olice Department]." (UC Mot. at 17.)

"[T]he reasonableness of privacy expectations [is linked] to such factors as (1) the identity of the intruder, (2) the extent to which other persons had access to the subject place, and could see or hear the plaintiff, and (3) the means by which the intrusion occurred." *Hernandez*, 47 Cal. 4th at 287. "[I]n the workplace, as elsewhere, the reasonableness of a person's expectation of visual and aural privacy depends not only on who might have been able to observe the subject interaction, but on the identity of the claimed intruder and the means of intrusion." *Sanders*, 20 Cal. 4th at 923. "[T]here is a difference between a public employee having a reasonable expectation of privacy in personal conversations taking place in the workplace and having a reasonable expectation that those conversations will not be intercepted by a device which allows them to be overheard inside an office in another area of the building." *Id.* at 918 (citing *Walker v. Darby*, 911 F.2d 1573, 1579 (11th Cir. 1990)).

"[W]here the other elements of the intrusion tort are proven, the cause of action is not defeated as a matter of law simply because the events or conversations upon which the defendant allegedly intruded were not completely private from all other eyes and ears." *Id.* at 911. "Privacy is not wholly lacking because the occupants of an office can see one another, or because colleagues, supervisors, visitors, and security and maintenance personnel have varying degrees of access." *Hernandez*, 47 Cal. 4th at 291. "There are degrees and nuances to societal recognition of our expectations of privacy: the fact that the privacy one expects in a given setting is not complete or absolute does not render the expectation unreasonable as a matter of law." *Sanders*, 20 Cal. 4th at 916.

Here, Plaintiffs have pled facts plausibly showing that Plaintiffs had a reasonable expectation of privacy in conversations at the UC Irvine Police Department. Plaintiffs have specifically alleged they "had a reasonable expectation of privacy . . . based upon the fact that such communications were made in non-public areas such as offices,

hallways, bathrooms, and other locations," because Plaintiffs "engaged in these conversations when no one was in the immediate area[,] and [because] Plaintiffs did not speak in a loud tone of voice." (FAC ¶ 29.) Further, Plaintiffs allege that the recording devices were strategically placed throughout the UC Irvine Police Department to record the communications in rooms where Plaintiffs reasonably believed conversations could not be overheard. (Id. ¶¶ 24, 25, 28, 29.) Finally, Plaintiffs allege Defendants recorded a variety of confidential communications, including private conversations concerning financing of mortgages, loans, and class members' private financial condition; specific medical treatments and medical history; meetings between union attorneys and their clients regarding their internal affairs investigations; union working conditions, concerted activities, and grievances involving their memorandum of understanding and other bargaining matters; marriages and child care. (Id. ¶ 30.) As a result, accepting as true all allegations of material facts in the FAC and construing all inferences in the light most favorable to Plaintiffs, the Court finds that Plaintiffs have alleged adequately a reasonable expectation of privacy in their conversations that were allegedly recorded in and around the UCI Police Department.

Accordingly, the Court will not dismiss Plaintiffs' common law privacy claim on this basis either.

iii. Highly Offensive to a Reasonable Person

The UC Defendants also contend that "the facts alleged in Plaintiffs' fourth cause of action are insufficient to show that the UC Defendants intruded into the privacy of Lopez or any other identified person in a manner highly offensive to a reasonable person." (UC Mot. at 17-18.)

A plaintiff "must show more than an intrusion upon reasonable privacy expectations. Actionable invasions of privacy also must be highly offensive to a reasonable person." *Hernandez*, 47 Cal. 4th at 295 (internal citation and quotation marks omitted). "Actionable invasions of privacy must be sufficiently serious in their nature, scope, and actual or potential impact to constitute an egregious breach of the social norms

underlying the privacy right." *Hill*, 7 Cal. 4th at 37. This element "essentially involves a 'policy' determination as to whether the alleged intrusion is 'highly offensive' under the particular circumstances. *Hernandez*, 47 Cal. 4th at 287.

Defendants are correct that Plaintiffs make the conclusory allegation that the "illegal intrusions in the privacy of Plaintiffs were highly offensive to a reasonable person." (FAC ¶ 123.) However, if the Court takes all of the FAC's factual allegations as true and construes all inferences in the light most favorable to Plaintiffs, as it must do at the motion to dismiss stage, Plaintiffs' allegation regarding the highly offensive nature of Defendants' alleged illegal intrusions is supported by the other allegations found throughout Plaintiffs' FAC. As discussed in greater detail above, Plaintiffs have alleged that the UC Defendants installed recording devices that had the capabilities of capturing conversations through walls, that the devices recorded conversations in allegedly private areas such as bathrooms, and that confidential union communications and conversations covered by the attorney-client privilege were recorded without Plaintiffs' knowledge or consent. Accordingly, at the motion to dismiss stage, Plaintiffs have alleged adequately that the alleged invasions of privacy would have been highly offensive to a reasonable person expecting such communications to be private and confidential.

However, Plaintiffs also argue that "Plaintiffs' claim fails because they do not plead facts that the UC Defendants *used* the alleged recordings in a highly offensive manner." (UC Reply at 12 (emphasis added).) In *Folgelstrom v. Lamps Plus, Inc.*, 195 Cal. App. 4th 986 (2011), the court stated that it had "found no case which imposes liability based on the defendant obtaining unwanted access to the plaintiff's private information which did not also allege that the *use* of plaintiff's information was highly offensive." *Id.* at 993; *see also Sunbelt Rentals, Inc. v. Victor*, 43 F. Supp. 3d 1026, 1036 (N.D. Cal. 2014) (stating that "plaintiff must show that the *use* of plaintiff's information was highly offensive," and finding that "[t]he possibility that Sunbelt may have reviewed text messages sent to a cell phone which it owned and controlled—without more—is insufficient to establish an offensive use") (internal quotation marks and citation omitted). As a result, in order to state a common law tort of intrusion claim, Plaintiffs must allege facts that plausibly suggest a highly offensive *use* of the alleged unlawful

recordings. Yet, the FAC is devoid of any detail regarding Defendants' use of the allegedly unlawful recordings.[6]

Accordingly, because Plaintiffs have failed to allege adequately that the UC Defendants used the alleged unlawful recordings in a highly offensive manner, the Court GRANTS the UC Defendants' Motion to the extent the UC Defendants' have moved to dismiss Plaintiffs' fourth claim. Plaintiffs' intrusion claim against the UC Defendants therefore is DISMISSED WITHOUT PREJUDICE.

H. 42 U.S.C. § 1983 (Claim 2)

JCI and the UC Defendants also have moved to dismiss Plaintiffs' § 1983 claim.

Section 1983 "creates a cause of action against a person who, acting under color of state law, deprives another of rights guaranteed under the Constitution. Section 1983 does not create any substantive rights; rather it is the vehicle whereby plaintiffs can challenge actions by governmental officials. To prove a case under § 1983, the plaintiff must demonstrate that (1) the action occurred 'under color of state law' and (2) the action resulted in the deprivation of a constitutional right or federal statutory right." *Jones v. Williams*, 297 F.3d 930, 934 (9th Cir. 2002) (quoting 42 U.S.C. § 1983).

[6] Plaintiffs contended at the hearing that they adequately allege the requisite highly offensive use of the recordings in paragraph 136 of the FAC, which states: "This ongoing irreparable harm is certain and not speculative, and documented by the Defendants' December 2013 email from Defendant Police Chief Paul Henisey both acknowledging that illegal audio recording was taking place and then informing all parties of the deletion of the very evidence of the illegal recording." (FAC ¶ 136.) This allegation, however, fails to suggest a highly offensive use of the alleged unlawful recordings, let alone provide any sort of detail on how Defendants may have used the alleged unlawful recordings in any manner.

1. JCI's Motion

JCI argues, relying on *Filarsky v. Delia*, 132 S.Ct. 1657 (2012), that "Plaintiffs' allegations on their face exclude JCI from liability under 42 U.S.C. section 1983 because JCI is immune as a contractor for the government." (JCI Mot. at 8.) JCI claims that Plaintiffs' § 1983 claim fails because they simply have alleged that RUC directed and controlled JCI's activities and that JCI's services and conduct were "inextricably intertwined" with the UC Defendants' actions. (Id. at 8-9.) JCI argues that it "should not be burdened with the threat of a 42 U.S.C. § 1983 action simply by contracting with the police department to install audio/visual equipment at the police station and following directions in that regard." (JCI Reply at 5.) Plaintiffs, however, argue that "JCI is not immune from liability under section 1983 as a contractor" because *Filarski* is inapplicable to the facts of this case. (JCI Opp'n at 6-7.)

Further, Plaintiffs argue that, even if JCI is entitled to qualified immunity, "[a]ll of the constitutional violations forming the basis of a section 1983 violation against JCI are well established and JCI is alleged to have violated such rights in the FAC." (JCI Opp'n at 8-9.) In response, JCI contends that the "mere existence of a statute, and even knowledge of the statute's existence, does not mean that JCI should have known it was violating it." (JCI Reply at 7.) Finally, JCI argues that it "was reasonable in its belief that it acted lawfully based on the Wiretap Act provisions excluding an installer from liability." (JCI Reply at 8.)

Here, the portions of JCI's Motion and Reply regarding this claim focus exclusively on the issue of qualified immunity. However, the crux of JCI's argument is that Plaintiffs' § 1983 claim fails because Plaintiffs simply allege that RUC directed and controlled JCI's activities and that JCI's services and conduct were "inextricably intertwined" with the UC Defendants' actions. (*See, e.g.* JCI Mot. at 8-9.) Though JCI has not moved to dismiss Plaintiffs' § 1983 for failure to state a claim under *Twombly/Iqbal* explicitly, the Court finds that the conclusory allegations asserted against JCI in the FAC warrant dismissal. *See, e.g. Wachtler v. Cnty. of Herkimer*, 35 F.3d 77, 82 (2d Cir. 1994) ("The district court has the power to dismiss a complaint sua sponte for

failure to state a claim, so long as the plaintiff is given notice and 'an opportunity to be heard.") (internal quotation marks and citations omitted); *Puccio v. Town of Oyster Bay*, 229 F. Supp. 2d 173, 178 (E.D.N.Y. 2002) (dismissing Plaintiff's claim sua sponte for failure to state a claim even though the defendant moved to dismiss the complaint on the basis of qualified immunity because the Court found that the plaintiff failed to provide any allegations supporting her equal protection claim). Plaintiffs allege that JCI "willfully participated and conspired" with the UC Defendants, that JCI's "actions were inextricably intertwined with the actions of" the UC Defendants, that JCI "acted under color of state law including but not limited to when it installed the recording equipment system, maintained the system, enabled the audio recording feature, used the system and instructed [the UC] Defendants how to use the system," and knowingly deleted the recordings with the participation of the UC Defendants. (FAC ¶ 89.) As discussed above, these allegations are legal conclusions and conclusory statements couched as factual allegations. Therefore, the Court finds that Plaintiffs have failed to state a claim because Plaintiffs FAC fails to allege adequately that Defendants acted under color of state law.

Accordingly, the Court GRANTS JCI's Motion to the extent JCI has moved to dismiss Plaintiffs' second claim. Plaintiffs' § 1983 claim against JCI therefore is DISMISSED WITHOUT PREJUDICE.

2. UC Defendants

The UC Defendants argue that Plaintiffs' § 1983 claim should be dismissed against RUC and Chief Henisey in his official capacity because RUC is a state entity, rather than a "person" within the meaning of the statute. (UC Mot. at 13.)

a) RUC

In their opposition, Plaintiffs state that, "[a]fter further research Plaintiffs have concluded that there may not be a viable claim under 42 U.S.C. section 1983 against

[RUC] as an arm of the State. As such, Plaintiffs do not intend to further assert this cause of action against [RUC]." (UC Opp'n at 2 n.1.)

Accordingly, the Court GRANTS the UC Defendants' Motion to the extent the UC Defendants have moved to dismiss Plaintiffs' second claim as asserted against RUC. Plaintiffs' § 1983 claim against RUC therefore is DISMISSED WITH PREJUDICE.

b) Henisey in His Official Capacity

Plaintiffs, however, argue that the injunctive relief sought against Henisey in his official capacity under § 1983 is proper under *Ex Parte Young*. (UC Opp'n at 18-19.)

Under *Ex Parte Young*, private individuals may sue state officials for prospective declaratory or injunctive relief against ongoing violations of federal law. *Verizon Maryland, Inc. v. Pub. Serv. Comm'n of Maryland*, 535 U.S. 635, 645 (2002); *see also Ex Parte Young*, 209 U.S. 123, 159-60 (1908) (holding that a suit challenging the constitutionality of a state official's action is not against the State). Here, Plaintiffs seek injunctive relief against Henisey in his official capacity. (*See* FAC ¶ 90.) Further, Plaintiffs allege that they currently do not know whether the audio recordings have ceased. (Id. ¶ 22.) As a result, though Plaintiffs may not be entitled to recover monetary damages from Henisey in his official capacity, there is no reason for the Court to dismiss Plaintiffs' § 1983 claim against Henisey at this time.

Accordingly, to the extent the UC Defendants move to dismiss Plaintiffs' § 1983 claim as asserted against Chief Henisey in his official capacity, the UC Defendants' Motion is DENIED.

c) Henisey and Hutchison in Their Individual Capacities

The UC Defendants have moved to dismiss Plaintiffs' § 1983 claims against Henisey and Hutchison in their individual capacities for two reasons.

First, the UC Defendants contend that Plaintiffs' § 1983 claim against them should be dismissed because, though "[t]he statute plainly requires that there be an actual

connection or link between the actions of the Defendants and the deprivation alleged to have been suffered by the Plaintiffs," Plaintiffs have failed to allege the requisite personal involvement necessary to proceed with a personal liability claim under § 1983. (UC Mot. at 14.) Plaintiffs, however, argue that the FAC sufficiently alleges that the individual UC Defendants "were directly involved in the violation of Plaintiffs' constitutional rights and as such are properly alleged to be liable to Plaintiffs under section 1983." (UC Opp'n at 16.)

As discussed above, Plaintiffs allege in their FAC that the UC Defendants "intentionally intercepted, disclosed, or intentionally used" audio recordings of Plaintiffs' confidential communications and transmitted them by cable or wire. (FAC ¶¶ 16, 23) Further, the FAC asserts that the individual UC Defendants "specifically requested that the listening devices installed at the UC Irvine Police Department have audio recording capabilities" and "specifically requested that [JCI] install the data cable lines from the Dispatch Center to the individual Business Manager's office so that the recordings made by the audio/video recording devices could be viewed and listened to outside of common areas available to general staff." (Id. ¶¶ 32, 35.) Thus, despite the UC Defendants contentions otherwise, the allegations in the FAC explicitly link the individual UC Defendants to the alleged intentional interception, disclosure, or use of a confidential communication. Further, Plaintiffs' allegations, taken as true, establish the individual UC Defendants' intent to intercept, disclose, or record Plaintiffs' communications. (Id.) Therefore, Plaintiffs have provided sufficient factual allegations to support the inference that the individual UC Defendants violated Plaintiffs' constitutional or federal statutory rights.

Second, the UC Defendants contend that, "even accepting Plaintiff's [sic] allegations as true, th[e FAC] is insufficient to state a Fourth Amendment claim because Plaintiffs have failed to allege facts showing that the individual defendants intentionally directed audio recordings in areas where there was a reasonable expectation of privacy." (UC Reply at 7.) However, as discussed in detail above, if the Court accepts as true all allegations of material facts in the FAC and construes all inferences in the light most

favorable to Plaintiffs, Plaintiffs have sufficiently alleged the requisite intentionality and a reasonable expectation of privacy in their communications.

Accordingly, the UC Defendants' motion to dismiss in regards to Plaintiffs' § 1983 claims as asserted against Henisey and Hutchison in their individual capacities is DENIED.

I. Writ of Mandamus – 28 U.S.C. § 1651 (Claim 5)

The UC Defendants argue that, because Defendants' removal of this action to federal court necessitates that Plaintiffs' FAC be construed according to federal law, Federal Rule of Civil Procedure 81, which abolishes writs of mandamus, applies. (UC Mot. at 19.) Further, the UC Defendants argue that, "[b]ecause Plaintiffs are not seeking correction of a district court error, their Fifth Cause of Action for a writ of mandamus should be dismissed." (UC Reply at 13-14.)

Plaintiffs, on the other hand, argue that "[t]he All Writs Act empowers district courts to issue writ relief in much the same manner that it authorizes appellate courts to issue such relief." (UC Opp'n at 19 (citing 28 U.S.C. § 1651(a)).) Plaintiffs contend that "[t]he destruction of what evidence remains will constitute irreparable harm to Plaintiffs and is not speculative – [a] part of the irreparable harm has already occurred and the UC Defendants have already demonstrated their willingness to willfully destroy evidence to frustrate Plaintiffs' claims against them." (Id. at 20.) The UC Defendants, however, respond that Plaintiffs' claim of irreparable harm is too speculative to establish the exceptional circumstances necessary to state a claim for a writ of mandamus. (UC Reply at 14.)

28 U.S.C. § 1651 provides that "[t]he Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." 28 U.S.C. § 1651(a). "The remedy of mandamus is a drastic one, to be involved only in extraordinary situations." *Bauman v. U.S. Dist. Court*, 557 F.2d 650, 654 (9th Cir. 1977). "[T]he writ has traditionally been used in the federal courts only to confine an inferior court to a

lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so." *Id.* (internal quotation marks and citations omitted).

Here, other than alleging that Defendants deleted the alleged recordings and that Plaintiffs currently do not know whether the audio recordings have ceased, Plaintiffs have failed to allege any facts to establish the requisite extraordinary circumstances to warrant relief under the All Writs Act. *See id.* at 654-55. Therefore, even assuming that this Court, as a district court, could issue a writ of mandamus under 28 U.S.C. § 1651, Plaintiffs' FAC and briefing fails to show that the facts of this case present the necessary "drastic," "exceptional," and "extra-ordinary" circumstances for this Court to issue writ relief. *See also California Energy Comm'n v. Johnson*, 767 F.2d 631, 634 (9th Cir. 1985).

Accordingly, the Court GRANTS the UC Defendants' Motion to the extent the UC Defendants have moved to dismiss Plaintiffs' fifth claim. The Court therefore DISMISSES WITH PREJUDICE Plaintiffs' writ of mandamus claim against RUC.

IV. CONCLUSION

For the foregoing reasons, JCI's Motion is GRANTED in part and DENIED in part. Plaintiffs' claim of special damages is STRICKEN, but with LEAVE TO AMEND. All claims asserted against JCI are DISMISSED WITHOUT PREJUDICE.

The Court also GRANTS in part and DENIES in part the UC Defendants' Motion. Plaintiffs' common law intrusion claim against RUC is DISMISSED WITHOUT PREJUDICE. Plaintiffs' remaining claims against RUC are DISMISSED WITH PREJUDICE. Plaintiffs' common law intrusion claim against Henisey in his official capacity is DISMISSED WITHOUT PREJUDICE. Plaintiffs' Wiretap Act claim against Henisey in his official capacity is DISMISSED WITH PREJUDICE. Plaintiffs' common law intrusion claim against Henisey and Hutchison in their individual capacities is DISMISSED WITHOUT PREJUDICE. Finally, the Court STRIKES Plaintiffs' request for damages to the extent that it is based on Plaintiffs' invasion of privacy claim and

STRIKES any request for punitive damages against RUC found in the FAC. The remainder of the UC Defendants' Motion is DENIED.

Accordingly, Plaintiffs' § 1983 claim against Henisey in his official capacity and Plaintiffs' Wiretap Act, CIPA, and § 1983 claims against Henisey and Hutchison in their official capacities are the only remaining claims in this action. Plaintiffs shall file any amended complaint **within 21 Days** of this Order. Failure to do so will result in the immediate dismissal with prejudice of those claims the Court has dismissed without prejudice in this Order.

Initials of Preparer: tg